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FUJITSU LIMITED, and
FUJITSU MICROELECTRONICS AMERICA, INC.

FILED

DISTRICT COURT OF GUAM

APR 25 2007 *mbe*

MARY L.M. MORAN
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

NANYA TECHNOLOGY CORP. and
NANYA TECHNOLOGY CORP. U.S.A.,

Plaintiff,

vs.

FUJITSU LIMITED, FUJITSU
MICROELECTRONICS AMERICA, INC.,

Defendants.

CIVIL CASE NO. 06-CV-00025

**EX PARTE APPLICATION UNDER
L.R. 7.1(j)&(k) TO OBTAIN A MAY
2007 HEARING DATE ON
DEFENDANTS' MOTION TO
IMMEDIATELY TRANSFER FOR
CONVENIENCE**

EX PARTE APPLICATION

Defendants Fujitsu Limited & Fujitsu Microelectronics America, Inc. (“Defendants”) hereby apply *ex parte* for an order granting them a hearing of their motion to immediately transfer this action for convenience in May 2007. If such relief is not granted, vast amounts of time, money and resources may be expended addressing jurisdictional discovery and related issues that could be avoided. An earlier hearing of the Motion to Immediately Transfer would likely conserve the Court’s and parties’ resources and thus is in the best interest of judicial economy for the reasons explained in the accompanying memorandum. As a substantially less desirable alternative, if such relief cannot be granted, Defendants asks that the motion be set for hearing on or before June 22, 2007.

In compliance with Local Rule 7.1(j)&(k), the memorandum set forth below contains the name of counsel for the opposing party, the reasons for the seeking of an *ex parte* order, points and authorities in support thereof, and a Certificate by Daniel M. Benjamin. As set out below, prior to bringing this application, defense counsel attempted unsuccessfully to reach an agreement with opposing counsel, and these papers are being served on opposing counsel immediately after filing.

Respectfully submitted this 25th day of April, 2007.

CALVO & CLARK, LLP
MILBANK, TWEED, HADLEY
& MCCLOY LLP
Attorneys for Defendants
Fujitsu Limited and
Fujitsu Microelectronics America, Inc.

By: _____

DANIEL M. BENJAMIN

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants are applying *ex parte* to request that the Court, if possible, hear their motion to immediately transfer this action (*see* Docket No. 192) on the earliest available date in May 2007.¹ Defendants make this request in the interests of justice and judicial economy.

A. An Intervening Supreme Court Case Warrants Prompt Consideration of Defendants' Motion to Immediately Transfer

In December, long before filing their Motion to Immediately Transfer this month, Defendants filed their Motions to Dismiss or Transfer. (*See* Docket Nos. 74 & 89). Although Defendants sought a prompt hearing at that time, to accommodate Plaintiffs' demand for jurisdictional discovery, a hearing was set for June 22, 2007 based upon a stipulation of the parties and Order of the Court. (*See* Docket Nos. 148 & 163). At the time of that stipulation, Defendants did not have the option of suggesting that the Court first consider transferring for convenience before engaging the jurisdictional issues. That option was unavailable because Ninth Circuit precedent at that time required courts to address personal jurisdiction *before* transfer for convenience.² That is why Defendants had no choice but to stipulate that certain discovery relevant to the jurisdictional issue would occur before any hearing. (*See* Docket No. 148).

But following that stipulation, the U.S. Supreme Court issued a decision on March 5, 2007 in *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, No. 06-102, 549 U.S. ___, 127 S.Ct. 1184 (Mar. 5, 2007). That case permits the Court to hear the motion to transfer without first deciding whether there is personal jurisdiction. Indeed, the Supreme Court clearly indicated that to be the desired course in cases such as this, where the jurisdictional issues are complex and

¹ Counsel will make themselves available on any date in May that the Court might be available, except that all parties must be in California for mediation on May 15 and for motions on May 17.

² This was based on then-applicable Ninth Circuit case-law. *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 800 n.3 (9th Cir. 2001).

1 involve extensive discovery, as more fully explained in Plaintiffs' motion. For that reason,
2 Defendants promptly filed their Motion to Immediately Transfer, and are asking that the
3 discretionary transfer issue be heard first.

4 **B. The Basis for an *Ex Parte* Application for a May Hearing**

5 The reason for this *ex parte* request for a hearing in May is that Defendants have
6 been unable to secure a prompt hearing date on their Motion to Immediately Transfer. When
7 Defendants first sought to meet and confer with Plaintiffs regarding the present motion, Plaintiffs
8 stated they would only agree to a prompt hearing if Defendants executed a very lengthy, very
9 substantive "stipulation" of fact. (See Benjamin Certificate, filed herewith,³ ¶ 3). Defendants
10 attempted to negotiate with Plaintiffs in good faith, but the negotiation consumed at least two
11 weeks without resolution – by which time Defendants found out that all available hearing dates
12 before the Court in May had disappeared, and that the first available hearing date was July 12,
13 2007. (*Id.*) Thus, unless this *ex parte* application is granted, the parties and Court will lose the
14 opportunity created by *Sinochem* to have the transfer issue resolved ahead of the jurisdictional
15 question.

16 **C. Granting this *Ex Parte* Motion and Promptly Hearing Defendants' Motion to**
17 **Immediately Transfer Will Likely Be of Great Benefit to the Parties and the Court**

18 Having the transfer issue resolved first will likely be of great benefit the Court and
19 the parties because it creates a potentially significant savings in resources for all. Presently, the
20 parties have become embroiled in time consuming and costly "jurisdictional" discovery. This has
21 already seen Plaintiffs serve over three hundred "jurisdictional" document requests to each
22 Defendant, 77 interrogatories to each Defendant and 27 requests for admission to each Defendant;
23

24
25
26
27 ³ Certificate of Daniel M. Benjamin in Support of Defendants' Ex Parte Application under
28 L.R. 7.1(j)&(k) to Obtain a May 2007 Hearing Date on Defendants' Motion to Immediately
Transfer for Convenience, or in the Alternative to Schedule such Hearing No Later than June 20,
2007 ("Benjamin Certificate").

1 take one depositions with three more scheduled; serve at least seven third party subpoenas; and
 2 file three motions to compel, all in an effort to find some basis for personal jurisdiction over the
 3 Defendants in this case. (Benjamin Certificate ¶ 4). Meanwhile, Plaintiffs have improperly
 4 refused to provide *any* substantive responses to Defendants' requests seeking Plaintiffs' basis for
 5 asserting personal jurisdiction in the first instance, and Defendants have initiated a meet and
 6 confer that will lead to further motion practice if a resolution is not reached. (*Id.*).⁴

8 All of this jurisdictional discovery could be mooted if the transfer issue is heard
 9 first and granted. Moreover, the Court and parties also could save substantial time with regard to
 10 the further briefing and upcoming argument on the jurisdictional issue, which is currently
 11 scheduled to occur over the next two months. As the Supreme Court stated in *Sinochem*, "where
 12 subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens*
 13 considerations weigh heavily in favor of dismissal, **the court properly takes the less**
 14 **burdensome course.**" *Sinochem*, 549 U.S. at ___, 127 S.Ct. at 1194 (emphasis added). Here, the
 15 far less burdensome course is to give an immediate hearing to the Motion to Transfer for
 16 Convenience.
 17

18 **D. The Risk of Prejudice Is to Defendants, Not Plaintiffs**

19 When Defendants first sought an earlier hearing date in their "Notice of Non-
 20 Agreement on Hearing Date" (*see* Docket No. 193), Plaintiffs filed in response a disingenuously
 21 titled "Agreement on [July 12] Hearing Date" in which they argued they could not agree to an
 22 earlier date because of the alleged "prejudice" that would create. (*See* Docket No. 198).⁵
 23
 24

25 ⁴ Indeed, given Plaintiffs' apparent failure to muster evidence to support personal
 26 jurisdiction, Defendants are increasingly concerned that Plaintiffs' new strategy is to put off the
 hearing on the motions to dismiss and transfer while they expand their discovery even further.

27 ⁵ Of course, since Defendants had not agreed to that date, the Court Clerk's office
 28 appropriately treated this as a non-agreement, with PACER presently indicating that there is no
 set hearing date and that the "Parties [are] unable to agree on hearing date."

1 Plaintiffs are effectively asking the Court to “pocket veto” Defendants’ Motion to Immediately
2 Transfer by seeking to shelve it until a month after the hearing currently scheduled for
3 Defendants’ Motions to Dismiss or Transfer. Such an effective denial without consideration of
4 Defendants’ motion is the real prejudice at stake here. Plaintiffs’ claim of “prejudice” on the
5 other hand is not even plausible.
6

7 First, Plaintiffs already briefed the convenience issues when they brought their
8 own motion to transfer in California. (*See* Benjamin Cert. Exh. B). Second, Plaintiffs have had
9 Defendants’ Motions to Dismiss or Transfer since they were filed in December 2006, so they
10 have had more than ample time to study the convenience issues. (*See* Docket Nos. 74 & 89).
11

12 The only true burden to Plaintiffs is in addressing *Sinochem*, which Plaintiffs have
13 known about since Defendants first approached Plaintiffs on March 26. Weighed against the
14 resources that Plaintiffs are devoting to harassing “jurisdictional” discovery (while stonewalling
15 all of Defendants’ requests), and the upcoming burdens of briefing and argument, it makes no
16 sense to put off a hearing on the Motion to Immediately Transfer. Indeed, but for the accident of
17 the Court’s crowded docket, this application would not even have been necessary as a hearing
18 date well before July 12, 2006 might have been available.
19

20 **E. Request for Relief**

21 For the reasons explained above, if it is possible for the Court to hear the Motion
22 to Immediately Transfer in May, it is respectfully requested that a May hearing be scheduled. If
23 not, it is respectfully asked that the Motion to Immediately Transfer be heard no later than the far
24 less preferable date of June 22, in the event that Plaintiffs protract jurisdictional discovery and the
25 Motion to Dismiss or Transfer is again delayed.
26

27 **F. Compliance with the Local Rules**

28

1 In compliance with Local Rules 7.1(j)&(k), Defendants note that Plaintiffs in this
2 action are represented by two local attorneys and several attorneys who are admitted *pro hac vice*.
3 Their addresses are as follows:

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On April 23, 2007, Defendants' counsel informed Plaintiffs' counsel Joseph Razzano of their intent to bring this application unless an agreement could be reached. (Benjamin Certificate ¶ 7). Mr. Razzano responded that Plaintiffs would oppose the *ex parte* request, wished to be served with any papers regarding it, and to be heard should there be a hearing thereon. (*Id.*)

1 This *ex parte* application is being served on Plaintiffs' local counsel with the accompanying
2 papers. (*Id.* ¶ 8).

3
4 Respectfully submitted this 25th day of April, 2007.

5 **CALVO & CLARK, LLP**
6 **MILBANK, TWEED, HADLEY**
7 **& MCCLOY LLP**
8 *Attorneys for Defendants*
9 Fujitsu Limited and
10 Fujitsu Microelectronics America, Inc.

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By:


DANIEL M. BENJAMIN